IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT S.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	**NO. 97-6710**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **August 28, 2001**

Plaintiff Robert S. ("Robert") and his mother, Kathryn P., brought suit against the Stetson School, Inc. ("Stetson"), Richard Robinson, Dave LaPrad, Ray Williams, Mike Williams, and Robert Martin (collectively, the "Stetson defendants") for physical and psychological abuse in violation of their constitutional rights under 42 U.S.C. §1983. Robert also brought various state law tort claims against the individual Stetson defendants, as well as §1983 claims against the City of Philadelphia, the Philadelphia Department of Human Services ("DHS"), and various DHS officials, and state law tort claims against the DHS officials.

BACKGROUND

On December 16, 1993, the Philadelphia Court of Common Pleas awarded DHS custody of Robert, who was 13 at the time. Robert had been both a victim and a perpetrator of sexual abuse. In May, 1995, DHS, with the mother's consent, placed Robert at the Stetson School in Barre, Massachusetts. Stetson is a non-profit charitable organization specializing in the treatment and

education of sex offenders. Robert alleged that during his time at Stetson, former staff member defendants Dave LaPrad, Mike Williams, Ray Williams and Robert Martin subjected him to physical and psychological abuse in violation of the school's anti-horseplay policy, and severely disrupted his treatment.

In a May 27, 1999, Memorandum and Order, Judge Robert S. Gawthrop, III ("Judge Gawthrop") granted summary judgment to the Stetson defendants on Robert's Section 1983 Equal Protection claim and on his mother's Section 1983 claim for interference with her right to familial integrity. Summary judgment was also granted to defendant Richard Robinson on various state law claims, and to the John Doe and Jane Doe defendants. This judge, finding that the Stetson School was not a state actor, later dismissed Robert's remaining Section 1983 claims against the Stetson defendants, see Robert S. v. City of Philadelphia, No. 97-6710, 2000 WL 288111 (E.D. Pa. Mar. 17, 2000), and also granted summary judgment on Robert's Section 1983 claims against the City of Philadelphia and individual City defendants, see Robert S. v. City of Philadelphia, No. 97-6710, 2000 WL 341565 (E.D. Pa. Mar. 30, 2000). All other claims against the City defendants were dismissed by agreement of the parties. The action then proceeded to trial against the Stetson defendants on plaintiff's remaining state law claims. The jury returned a verdict for defendants on all counts.

The Stetson defendants then moved for attorney's fees pursuant to 42 U.S.C. §1988 and Federal Rule of Civil Procedure 11. Robert appealed this court's decision on state action as well as two evidentiary rulings; the Court of Appeals for the Third Circuit affirmed. See Robert S. v. City of Philadelphia, 256 F.3d. 259 (3d Cir. 2001). Pending is the Stetson defendants' petition under 42 U.S.C. §1998 or Fed. R. Civ. P. 11 for counsel fees in the amount of $149,875.00 and expert fees in the amount of $4,927.96, a total of $154,802.96. For the reasons discussed herein, the motion will be granted in part and denied in part.

DISCUSSION

I. 42 U.S.C. §1988

In a Section 1983 action, the court may award attorney's fees and expert costs to the prevailing party. See 42 U.S.C.A. §1988(b)-(c) (West 1994 & Supp. 2001). A "prevailing party" may be a plaintiff or a defendant, but when awarding attorney's fees to a prevailing defendant, the standard is more stringent. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); Barnes Fdn. v. Township of Lower Merion, 242 F.3d 151, 157-58 (3d Cir. 2001). The standard for awarding attorney's fees to a prevailing defendant in a Section 1983 action is the same as in a Title VII action. See Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983); Barnes Fdn., 242 F.3d at 158 n.6; Commonwealth v. Flaherty, 40 F.3d 57, 60-61 (3d Cir. 1994).

"[A] district court may in its discretion award attorney's fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg, 434 U.S. at 421 (prevailing defendant in a Title VII action should not be awarded attorney's fees because the district court found that plaintiff's bringing the suit was not unreasonable or frivolous and the issue on which the defendant prevailed was one of first impression); Barnes Fdn., 242 F.3d at 158 (although the district court did not err in holding that the plaintiff's claim was not frivolous, the claims were factually groundless; attorney's fees should be awarded); EEOC v. L.B. Foster Co., 123 F.3d 746, 751 (3d Cir. 1997)(award of attorney's fees to prevailing defendant in a bench trial inappropriate because plaintiff made out a prima facie case on two claims and the third claim was without precedent in the circuit; the claims were not frivolous).

Courts should exercise caution in awarding attorney's fees to defendants to avoid chilling potential Section 1983 plaintiffs from seeking to vindicate their constitutional rights. See Kutska v. California State College, 564 F.2d 108, 110 (3d Cir. 1977)(granting defendants' motion for attorney's fees incurred during plaintiff's appeal of his Title VII claim because plaintiff's appellate brief was completely without merit and

plaintiff conceded he was not discriminated against because of his membership in a protected class); Rounseville v. Zahl, 13 F.3d 625, 632 (2d Cir. 1994); Baby Doe v. Methacton Sch. Dist., 920 F. Supp. 78, 79 (E.D. Pa. 1996).

Factors that may be considered in determining whether to award fees to a prevailing defendant include whether: (1) plaintiff established a prima facie case; (2) defendant made a settlement offer; (3) the case was dismissed prior to trial; (4) the issue on which defendant prevailed was one of first impression; and (5) there was a real threat of injury to the plaintiff. See Barnes Fdn., 242 F.3d at 158; L.B. Foster, 123 F.3d at 751.

A. Robert S.

The Section 1983 claims against the Stetson defendants were ultimately dismissed in their entirety because Stetson was not a state actor. Following an evidentiary hearing, this court found no "symbiotic relationship" or a "close nexus" between Stetson and either the City of Philadelphia or the Commonwealth of Massachusetts; the court also determined that Stetson did not serve a "public function." See Robert S., 2000 WL 288111, at *6. The court relied heavily on the Supreme Court's opinion in Rendell-Baker v. Kohn, 457 U.S. 830 (1982), holding that a private school educating maladjusted students referred to it by

the state was not a state actor despite extensive state regulation and reliance on state funds. See id. at 840-41.

Arguably contrary authority from another circuit weighs against a finding that plaintiff's pursuit of Stetson under Section 1983 was frivolous. The Tenth Circuit Court of Appeals, distinguishing Rendell-Baker as relating to employment issues only, held a private school educating teenage boys with severe physical, psychological or emotional problems was a state actor. See Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982). This court held that the Rendell-Baker decision was not confined to private school employees but applied equally to student disputes as in Stetson and Milonas, but plaintiff's argument was neither frivolous nor unreasonable. Only after careful consideration of the evidence and rejection of the Milonas reasoning did the Court of Appeals conclude that Stetson was not subject to suit under 42 U.S.C. §1983.

Robert did not ultimately prove a prima facie case under Section 1983, but it was a close question decided after consideration of written submissions and an evidentiary hearing in the court below. The serious consideration both the district and appellate court gave the issue precludes a finding that it was frivolous or unreasonable.

Defendants also argue that Robert's Section 1983 action was frivolous because he failed to prove he had suffered any

recoverable injury. Judge Gawthrop, in denying Stetson's motion for summary judgment on Robert's due process claims, found that some of Stetson's counselors admitted to some of the alleged horseplay violations and Stetson had a "history of horseplay complaints." Kathryn P. v. City of Philadelphia, No. Civ. A. 97-6710, 1999 WL 391492, *5 (E.D. Pa. May 27, 1999).

There was also evidence at trial that some of the individual defendants, having engaged in "horseplay" in violation of Stetson rules, had been disciplined by Stetson. Plaintiff's experts testified that Robert needed a multi-modal treatment plan as a result of defendants' conduct. Even though the jury chose to discredit those experts, Robert's testimony was not completely unsupported and contradicted by every other witness, as in Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990)(affirming Section 1998 fee award for defendants on plaintiff's claims of excessive force and deliberate indifference). Whether Robert was injured by this "horseplay" was in dispute. The jury found against him, but there was some evidence of injury presented by the plaintiff.

There was a clear factual dispute whether Robert, as both a victim and perpetrator of sexual abuse, was injured by defendants' admittedly inappropriate conduct. Plaintiff's case was not so lacking in evidence of injury that the action was frivolous, unreasonable or without merit. Counsel for the

Stetson defendants are not entitled to an award of attorney's fees under Section 1988.[1]

Defendants also seek costs as the prevailing party at trial; costs are allowed as of course to a prevailing party absent an express statutory provision to the contrary unless the court otherwise directs. See Fed. R. Civ. P. 54(d)(1); In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 462 (3d Cir. 2000)(remanding for determination whether plaintiff's indigency or inability to pay should preclude or limit an award of costs to prevailing defendant). However, counsel did not itemize the portion of the $149,875.00 they seek in "attorney's fees" that is attributable to litigation costs. No bill of costs has been filed. Without such specification, no costs can be awarded.[2] See Loughner v. University of Pittsburgh, — F.3d —, Nos. 00-1561, 00-1613, 2001

[1]Even if counsel had been entitled to attorney's fees under Section 1988, they would be barred from recovering such fees for their failure to submit billing records, affidavits in support of their motion, or any other evidentiary support for the amounts claimed. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)("[t]he party seeking an award of fees should submit evidence supporting the hours worked and rates claimed."); Maldonado v. Houstoun, 256 F.3d 181, 184 (3d Cir. 2001) (same); Lanni v. New Jersey, – F.3d –, Nos. 00-1945, 00-5020, 2001 WL 769025, *3 (3d Cir. June 5, 2001)(the party seeking fees bears the burden of producing sufficient evidence in support of the hourly rate sought).

[2]The defendants were awarded $1,071.00 in costs on appeal by the Court of Appeals. By letter dated August 1, 2001, counsel for defendants informed the court of costs it was awarded by the Court of Appeals and requested that this court "rule on defendants' Bill of Costs that was filed at the District Court level."

WL 811103, *6 (3d Cir. July 18, 2001)(one-page statement containing dates and descriptions of costs incurred without supporting data explaining the relevance of the expenditures insufficient for appellate review of grant of costs).

However, counsel does specifically claim $4,927.96 for expert witness fees. Defendants paid to depose plaintiff's experts, Nurse Burgess, Dr. Prentky, Dr. Dougherty, and Ms. Yudkoff, $1,400.00, $1,800.00, $1,200.00, and $527.96, respectively, for a total of $4,927.96. Although defendants have not submitted any supporting documentation for these expert witness costs, plaintiff has not objected.[3] Defendants will be awarded $4,927.96 in expert witness costs. See Tuthill v. Consolidated Rail Corp., No. Civ. A. 96-6868, 1998 WL 321245, *6 (E.D. Pa. June 18, 1998)(Shapiro, J.)(prevailing defendant entitled to costs incurred in deposing plaintiff's experts because defendant was entitled to take the depositions under the FRCP; it was appropriate trial preparation).

B. Kathryn P.

Defendants also argue that the mother's Section 1983 claims against Stetson were dismissed by Judge Gawthrop as completely unfounded. DHS, rather than his mother, had custody of Robert both before and after he attended Stetson. Judge Gawthrop,

[3]Plaintiff did not submit any objections to defendants' fee petition.

citing Denman v. Wertz, 372 F.2d 135 (3d Cir. 1967),[4] held that a parent cannot maintain a Section 1983 claim for violation of familial integrity unless that parent has custody of the child whose rights are violated. Kathryn P., 1999 WL 391492 at *5.

Plaintiff attempted to distinguish Denman in asserting a Section 1983 claim on behalf of Robert's mother. The Denman opinion does not specifically state that a non-custodial parent has no right to familial integrity, but just concluded that under the alleged facts, the parent did not state a claim under 42 U.S.C. §§ 1983 and 1985. Plaintiffs also cited a more recent decision of a lower court in this circuit that denied summary judgment on a Section 1983 claim by parents for denial of the "right to . . . companionship, care, custody, and management" of their adult son, not in his parents' custody, but married with children of his own. Estate of Cooper v. Leamer, 705 F. Supp. 1081, 1086-87 (M.D. Pa. 1989). See also Estate of Bailey v. County of York, 768 F.2d 503, 509 n.7 (3d Cir. 1985)(overruled on other grounds)(acknowledging a father's cognizable liberty interest in the custody of his child and the maintenance and integrity of the family); Schieber v. City of Philadelphia, — F.Supp.2d —, No. 98-5648, 2001 WL 869034, *2 (E.D. Pa. May 9,

[4]In Denman, a pro se father failed to allege sufficient facts to state a cause of action under Sections 1983 or 1985 against police officers and a probation officer who returned his minor children to the custody of their mother. Denman, 372 F.2d at 135-36.

2001)(parents have an actionable liberty interest in the life of their independent adult daughter); McCurdy v. Dodd, No. Civ. A. 99-5742, 2000 WL 250223 (E.D. Pa. Feb. 28, 2000)(father permitted to proceed on §1983 claim for loss of companionship of his child, without reference to child's age); Agresta v. Sambor, 687 F. Supp. 162, 164 (E.D. Pa. 1988)(parents stated cause of action under §1983 despite age and marital status of son). Cooper is arguably distinguishable because it involved the child's death rather than the right to "bodily integrity" asserted here. Judge Gawthrop's opinion is not reconsidered, but plaintiff's attempt to distinguish Denman was not frivolous or unreasonable; there is no basis for awarding attorney's fees under Section 1988.

II. Rule 11 Sanctions

Federal Rule of Civil Procedure 11(c) permits the court to sanction a party or an attorney for violation of Rule 11(b), a representation that pleadings: (1) are not presented for an improper purpose; (2) do not contain legally frivolous and unsupportable claims; and (3) do not contain unsupportable factual allegations. See Fed. R. Civ. P. 11(b)(1)-(3). The standard to determine whether a violation has occurred is "reasonableness under the circumstances." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987).

Defendants' Rule 11 arguments are virtually identical to their Section 1988 arguments, so their motion for Rule 11

sanctions will be denied for the same reasons: plaintiff's Section 1983 claims, though ultimately legally unsupportable, were not so lacking in merit that they may be described as frivolous or unreasonable.

Moreover, “all motions requesting Rule 11 sanctions [must] be filed in the district court before the entry of a final judgment" and "as soon as practicable after discovery of the Rule 11 violation." Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 100 (3d Cir. 1988). “[T]he purpose of the Pensiero rule was to eliminate piecemeal or serial appeals in the same case" and was not overturned by the 1993 amendments to Rule 11 providing a 21-day "safe harbor" before a Rule 11 motion may be filed. See Daliessio v. DePuy, Inc., 178 F.R.D. 451, 452-53 (E.D. Pa. 1998). Here, final judgment was entered prior to defendants' Rule 11 motion; the motion is untimely.

Defendants' Rule 11 motion may also violate the "safe harbor" provision that a Rule 11 motion must be served 21 days before it is filed. See Fed. R. Civ. P. 11(c)(1)(A). The certificate of service states that it was served on all parties on April 27, 2000. Defendants' motion was filed the same day. There is no suggestion that defendants served the motion on plaintiffs 21 days before filing. Counsel is not entitled to fees under Rule 11.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of August, 2001, upon consideration of the motion of defendants Stetson School, Inc., Richard Robinson, Dave LaPrad, Ray Williams, Mike Williams and Robert Martin for Attorney's Fees (Docket #158), it is **ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part.

a. Defendants are not awarded any attorney's fees.

b. Defendants are awarded costs for expert witness fees in the amount of $4,927.96 only.

_____
S.J.